PUBLIC PROSECUTOR

v.

ONG POH CHENG

HIGH COURT MALAYA, PENANG
TUAN JEFFREY TAN JC
[CRIMINAL CASE NO. 45-11-93]
1 NOVEMBER 1995

EVIDENCE: *Identification parade - Complainant and witnesses in same room during identification - Parade behind one-way mirror - Whether safeguards followed - Whether parade was conducted fairly.*

CRIMINAL LAW: *Armed robbery - Discharge of firearm with intent to cause harm and death - Proof of possession of firearm - Whether evidence of ballistics expert necessary - Whether oral evidence of witnesses who saw firearm sufficient - Section 3 Firearms (Increased Penalties) Act 1971.*

CRIMINAL LAW: *Committing armed robbery and discharging a firearm with intent to cause death or hurt - Whether accused had discharged a firearm "at the time of his committing the scheduled offence" - Construction of statute - Sections 3 & 4 Firearms (Increased Penalties) Act 1971.*

On 18 August 1992, the accused came as a customer to the complainant's goldsmith shop, whipped out a gun and demanded the gold ornaments displayed in the counter. After taking some gold ornaments, the accused walked out of the shop with the gun in his right hand. The accused was seen discharging his firearm at some adjoining shops. Two police constables (PW9 and PW12) who were in the vicinity proceeded to investigate whereupon the accused shot at the constables resulting in an exchange of gunfire. The accused then managed to get onto a parked motorcycle and speed off.

3 bullet slugs were recovered in the complainant's shop and flower pot outside and an armaments officer testified that the slugs were not government issue. It was not sent for examination by a ballistics expert. The gold ornaments recovered were identified by the complainant as the ones that were handed to the accused. Counsel for the accused submitted no case to answer on *inter alia* the following grounds:

(i) The identification was defective. The robber was helmeted but other participants of the parade were not. The parade was conducted behind a one-way mirror and the accused could not witness the identification process.

(ii) The charge was defective as the prosecution evidence indicated the alleged robbery was committed inside the shop but the firearm was discharged outside the shop.

(iii) There was no proof of possession of the firearm as the firearm was not recovered. Oral evidence of witnesses who saw the firearm was insufficient and a ballistics expert should be called to testify.

(iv) The constables' revolvers should have been tested for serviceability by the chemist or armaments officer.

Held:

[1] The fact of the robbery and the identity of the robber were not in doubt. In addition to identification by the witnesses, the accused had 2 healed gunshot wounds consistent with the police officer's evidence.

[2] Since the case was not of possession but of the discharge of a firearm in the course of a schedule offence, the ingredients being the commission of a schedule offence and a discharge of a firearm, the evidence of a ballistics expert was not necessary. Insistence on the production of the firearm concerned where retrieval is not possible will only set an unachievable standard of proof and render sterile the intent of s. 3 FIPA and encourage firearm offences. The non-production of the firearm was entirely reasonable.

[3] The identification parade could not be relied upon as it was not fairly conducted. the identifying witnesses were in the same room and the accused and 11 others were paraded behind a one-way mirror. The accused was not given an opportunity of seeing the actual identification process and his accusers.

[4] Whether the accused had discharged his firearm "at the time he was committing" the schedule offence has to be answered by a strict interpretation as s. 3 is a penal provision. Narrowly construed, the natural meaning of the words emphasise the time of commission of the offence and specifies the discharge of a firearm before the completion of a schedule offence. The accused discharged his firearm not at his victims and it was not proved that the accused discharged a firearm "at the time of his committing the robbery". Since the schedule offence was completed when the accused was outside the complainant's shop, the discharge of the firearm was an act separate and distinct from the robbery. Therefore it was appropriate to amend the charge to s. 4 under FIPA of robbery by exhibiting a firearm with an additional charge under s. 308 Penal Code for intending to cause death by shooting at the constables.

[5] The accused could not make out his defence that the gun was an imitation gun and could not raise a doubt on the discharge of the firearm proved by the prosecution. The prosecution case was clear cut, straight forward and absolute and there was no doubt what had actually happened.

[Accused convicted].

Cases referred to:
Sun Kam Heng v. PP [1993] 1 CLJ 109 ***(dist)***
PP v. Abdul Rahim bin Abdul Satar [1990] 3 MLJ 188 ***(refd)***
PP v. Choo Chuan Wang [1992] 2 CLJ 1242 ***(refd)***
Ong Lai Kim v. PP [1991] 3 MLJ 111 ***(foll)***
PP v. Hussain bin Sudin [1991] 3 CLJ 2568 ***(refd)***
PP v. Chiong Cheng Wah [1988] 3 MLJ 56 ***(refd)***
PP v. Yap Thiang Wah [1992] 1 MLJ 206 ***(refd)***
Krishnan & Anor. v. PP [1981] 2 MLJ 121 ***(refd)***
Doed. Ellis v. Owens [1842] 12 LJ Ex 53 ***(refd)***
Sp Suppiah Chettiar v. KS Navaradnam [1972] 2 MLJ 60 ***(refd)***
Sakhuja v. Allen [1972] 2 AER 311 ***(refd)***
Khoo Hi Chiang v. PP [1994] 1 MLJ 265 ***(refd)***
Lin Lian Chen v. PP [1992] 4 CLJ 2086 ***(refd)***

Legislation referred to:
Criminal Procedure Code ss. 2, 3, 165
Criminal Procedure Code (FMS Cap 6) s. 5
Evidence Act, 1950
Firearms (Increased Penalties) Act 1971, ss. 3, 4
Penal Code (FMS Cap. 45) ss. 308, 392, 397
Road Safety Act 1967, ss. 3, 3(3)(a)
Road Transport Act 1981 (UK), s. 25

Other sources referred to:
Archbold's Criminal Pleading and Practice, 43rd Edn., p. 1148
Black's Law Dictionary, 6th Edn.,

For the public prosecutor - Ishak bin Mohd. Yusoff; DPP
For the accused - Athimulan s/o Muruthiah; M/s. Athimulan & Co.

JUDGMENT

Jeffrey Tan JC:

The accused was charged for an offence punishable under s. 3 of the Firearms (Increased Penalties) Act 1971. The charge read as follows:

> Bahawa kamu pada 18 Ogos 1992, jam lebih kurang 3.30 petang, di kedai Tai Loong Diamond & Jewellary, di No. 90, Lebuh Pitt, di dalam Daerah Timur Laut, di dalam Negeri Pulau Pinang, telah melakukan rompakan di kedai berkenaan, dan semasa melakukan rompakan itu, kamu telah melepaskan tembakan senjatapi ke arah Kons. 89541 Mohd. Tahir bin Mohd. Shah dan Kons. 109196 Mohd. Yusof bin Ismail, dengan niat menyebabkan kecederaan atau kematian, dengan demikian kamu telah melakukan satu kesalahan di bawah Seksyen 3, Akta Senjatapi (Penalti Lebih Berat) tahun 1971 (Akta 37) yang boleh dihukum di bawah Seksyen yang sama Akta tersebut.

The testimony of 19 prosecution witnesses may be summarised as follows.

At about 3 p.m. to 3.15 p.m. on 18 August 1992, SP1 and his brother (SP15, the complainant) were attending to 2 clients at their goldsmith shop, Tai Loong Diamond and Jewellery of 90 Pitt Street, Georgetown. They saw the accused parking a motor-cycle outside their shop. The complainant opened the front door of their shop for the accused. The accused entered the complainant's shop and was attended to by SP1. The accused asked and was shown certain gold ornaments. Having inspected those ornaments, the accused asked and was shown further ornaments. Not long thereafter, the complainant's other 2 clients left the shop. The accused then whipped out a gun and declared he was staging a hold-up. The accused demanded the gold ornaments displayed in the counter, and SP1 removed two trays containing gold ornaments from the display counter and handed it to the accused. The accused emptied the gold ornaments into a plastic bag, and proceeded to walk out of the shop. Failing to open the front door, the accused then flashed his gun at the complainant and demanded that the door be opened for him. The complainant opened the front door, and the accused with a gun in his right hand and a bag of gold in the other (SP1 however said the accused had pocketed the bag) then walked out of the shop. As soon as the accused had stepped out of the shop, the complainant and SP1 saw the accused firing his gun in the direction of the adjoining shops on the right, that is the shops with numbers 92 and onwards. Huddling behind the display counter, both complainant and SP1 said they heard several rounds of gunfire, and saw, from the mirrors on the walls, the accused discharging his gun. They said the accused's gun was similar to those used by the Royal Malaysian Police.

At about that time two police constables, SP9 and SP12, were patrolling in the vicinity. SP9 has just signed the police visitation book at 94 Pitt Street, the business premises of a neighbouring goldsmith 2 doors away from the complainant's shop, when a security guard (Sebastian a/1 Santharan) employed by the goldsmiths in the area (including the complainant), came inside shop 94 and informed them that a robbery was taking place in the complainant's shop. The constables proceeded immediately to investigate. The front door of the complainant's shop was made of glass, and the constables saw the accused behind the front door with a gun in his right hand. The accused got out of the complainant's shop and started shooting at the constables with a firearm. The constables returned the accused's gunfire. SP12, covered by SP9, then dashed to a large flower pot standing in front of the complainant's shop. A further exchange of gunfire ensued between the constables and the accused. The accused who was hiding behind the shop front pillars then got onto a motorcycle parked outside the complainant's shop and sped off in the direction of Chulia Street, with SP9 and SP12 on foot in vain pursuit, but discharging nonetheless gunshots at the fleeing accused.

In the subsequent police investigation, the police officer then in charge of the investigation (SP18) recovered 2 bullet slugs from the complainant's shop and one near the large flower pot. The 3 bullet slugs were not sent for examination by a ballistic expert, but an Armaments Officer from the Penang police contingent (SP11) testified that the bullet slugs produced in Court were not government issue. The bullet slugs were however examined by a government chemist (SP10) but he was not able to determine its calibre. As for the gold ornaments lost in the robbery, SP1 identified the gold ornaments in envelopes EX1A, EX1B, EX1C and EX1D (P5(16), P6(4), P7(11), P8(8)) as part of the ornaments in the two trays he handed to the accused.

Submissions at the Close of Prosecution Case

Learned Counsel submitting there was no case to answer made the following points:

(a) The identification of the accused was doubtful: SP9 and SP12 had sight of the robber for only 2 to 3 minutes, and even then under the tension of a running battle. The robber was helmeted, but all participants of the identification parade were not. One Ong Khoon San was put to the officer in charge of the parade as having participated in the parade, and Ong Khoon San was not called to rebut that suggestion. The identification at the parade using a one-way mirror was entirely improper.

(b) The charge was defective, as the prosecution evidence indicated the alleged robbery was committed inside the shop but the firearm was discharged outside the shop.

(c) There was no proof that the accused had a firearm: The Supreme Court case of *Sun Kam Heng v. PP* [1993] 1 CLJ 109 required a firearm to be strictly proved by the evidence of a ballistics expert who had examined and tested the firearm in question, and since the firearm was not recovered, examined and naturally not produced, the oral evidence of 4 witnesses - that they saw a firearm - was not the proof of a firearm within the definition of s. 2 of the Act.

(d) The failure to examine the constables' revolvers for its serviceability, either by a chemist or Armaments Officer, was a further defect in the prosecution case.

(e) There was no evidence of any bullet marks on the adjoining shops' pillars consistent with the constables' story that they were shot at while standing in front of the adjoining shops.

(f) There was no evidence on the proper custody of the bullet slugs before it was produced in Court.

Concluding his submission, learned Counsel said the evidence at the very most disclosed only an offence under s. 392 read together with s. 397 of the Penal Code (FMS Cap. 45), but it did not disclose a s. 3 offence, much less the discharge of a firearm. He also pointed out certain discrepancies in the prosecution witnesses' evidence.

Expressing his understanding of s. 3, the learned DPP contended that the words "at the time of his committing the schedule offence" encompass any subsequent conduct to facilitate the commission of a schedule offence. He however admitted that his proposition on s. 3 was lacking judicial authority, but he said that the proximity in time and place between the robbery inside the shop and the discharge of the firearm outside, was analogous to s. 165 of the CPC, and by drawing a parallel, were the one and same offence. The discharge of the firearm, he said, was to facilitate "the escape from the crime of robbery". On proof of firearm, he submitted that all material witnesses had testified that the accused discharged the gun held in his hand, the bullet slugs recovered from the scene was the undoubted evidence of a third firearm, and the constables said they were shot at by the accused; the prosecution case could not be any clearer.

On the identification parade, the learned DPP maintained it was regular; the accused was asked if he required a solicitor, and Ong Khoon San was not called to testify as the officer in charge of the parade (SP14) by naming all the participants, and there was no Ong Khoon San, had impliedly rebutted Ong Khoon San's participation. As for the non-production of the gun, he said the gun was not recovered. He urged the Court to consider why SP9 and SP12 had to shelter behind pillars and a flower pot if gunshots were not fired at them. On other issues raised by learned Counsel, the learned DPP submitted that the evidence on the 3 bullet slugs by the Armaments Officer should not be marked down just because he examined the slugs in Court but not prior to the trial. On point raised by learned Counsel (at the stage it was tendered) that the police constable who reduced the complainant's verbal report into writing was not called, he said, the constable who reduced the complainant's oral report into writing was *ipso facto* not turned into the maker of the report (see *PP v. Abdul Rahim bin Abdul Satar* [1990] 3 MLJ 188), and the report was not hearsay as the complainant signing on the report had adopted the contents as his own. In conclusion, he said the prosecution had at the very least proven a *prima facie* case for a s. 4 (of the Act) offence.

Findings of the Court

That there was a robbery within the meaning of the Penal Code was inarguable; the recovery of the gold ornaments contained in 4 envelopes marked EX1A, EX1B, EX1C and EX1D by the investigation officer coupled with the definitive and precise manner in which it was identified - SP1 weighed each gold ornament produced in Court and compared the weight obtained with his list of the weight and description of the gold ornaments lost during the robbery, all laboriously and painstakingly carried out while giving his evidence - left no doubt whatsoever that the gold ornaments contained in the 4 envelopes EX1A to EX1D came from the complainant's shop, and substantiated unquestionably veracity in the complaint of both the robbery and the ensuing material loss.

Who robbed the complainant's shop was also not in doubt. SP1 who attended to the robber for about 10 minutes had ample time to observe and register the features of the robber, and both SP1 and SP15 pointed unhesitatingly to the accused as the robber. Without a waver

both said the accused had a gun during the hold up. Thus compelled, SP1 handed to the accused the gold ornaments. Categorical and forthright, they both said the accused had a gun, similar to that used by the police, in his right hand.

The police constables (SP9 and SP12) who had the shootout with the robber were equally specific in their identification of the accused as the robber who shot at them at the material time in question.

So the accused was indelibly and positively identified by the complainant (SP15), SP1, SP9 and SP12, in manner assertive and unfaltering. Apart from that indelible identification, in Court that is, there was other evidence that pointed irresistibly to the accused as the robber. The constables who said they returned the robber's gunfire testified they had discharged shots at the fleeing robber, and in the words of SP9, "saya rasa dia kena tembak". The accused arrested one month after the robbery, was sent to the Penang General Hospital where he was radiographed and was examined by a government forensic pathologist (SP2).

Those radiographs were exhibited, and SP2 duly pointed out, to the Court, the physical injuries shown on the radiographs. He testified that his physical examination of the accused and the radiographs indicated, and it was so accepted by the Court, the accused had 2 healed gunshot wounds. One wound was in the elbow region of the left arm and the other in the right buttocks, with the entry point in each case from the back of the accused, wounds not inconsistent with (i) the accused being shot at while his back was turned to the gun/s firing at him, and (ii) the constables' shots at the fleeing robber.

By no stretch of the imagination could it be said that gunshot wounds were frequent in Georgetown or in Malaysia for that matter. However it could be said that no shooting incident, a rare and sensational incident, could be hidden from the authorities unless the assailant and victim intended it so and even then near impossible if one had sustained a gunshot wound. That being so, the shooting incident that caused the accused's gunshot wounds would not have been missed by the authorities. If the accused was a victim, he would have reported the incident; but there was no such report, the accused's or anyone else's, except the constables's information, and the accused's wounds were not inconsistent with the wounds sustained by the robber shot at as he was fleeing the scene.

As noted, the robbery was established beyond a reasonable doubt. The defence submitted that no weapon was involved. It was however a submission that could not be reconciled with the undoubted facts; why should the complainant and SP1, and it was observed that either was bigger than the accused, passively and submissively hand over the ornaments and not overpower the accused? Learned Counsel said, if at all there was only a robbery; yet his guarded concession was begging the question, "robbery, and with what?"

In the instant case, as in *PP v. Hussain bin Sudin* (*supra*), the firearm was not recovered; it was contended by the defence that the firearm in question must be produced, and in the absence of a firearm and a ballistic expert's report towards proof of a firearm within the meaning of s. 2, meant there was no case that the accused at the time of his committing the robbery had discharged, much less exhibited, a firearm.

With respect to learned Counsel, *Sun Kam Heng v. PP* (*supra*) was a case of possession of a firearm in a security area, and a ballistic expert and chemist report were both needed to prove that the firearm produced was a firearm. The instant case was not of possession but of the discharge of a firearm in the course of a schedule offence, the ingredients being the commission of a schedule offence and the discharge of a firearm (see *PP v. Choo Chuan*

Wang [1992] 2 CLJ 1242 at p. 1249), quite unlike possession offences, as in the case of dangerous drugs where the identity of the drug produced must be strictly proved by a chemist, and in the case of a firearm where the expert testimony of an armourer and the report of the government is required to prove a firearm.

If the success of a s. 3 prosecution is dependent upon the production of the firearm concerned, and it might have been disposed of in myriad ways where retrieval is not possible, the insistence yet on the production of the firearm concerned will only set an unachievable standard of proof but also render sterile the intent of s. 3 and encourage firearm offences.

That being so, the non-production of the firearm, entirely reasonable, was not a defect in the prosecution case. Indeed, the evidence of the material witnesses manifested the accused had a firearm; the constables discharged several rounds and were held back for 2 - 3 minutes, while they could easily have pounced on the robber if the robber was unarmed. Furthermore none of the material witnesses were shown to be of profligate or abandoned character, and there were no reasons to doubt or question their testimony that the robber had discharged the gun that was in his hand.

On the bullet slugs recovered from the scene, where it was recovered was however in doubt. SP18 said he recovered 2 slugs from shop 90, in the places shown in photographs P21(6) and P21(9). He subsequently corrected himself and said he was not sure where one slug (the one in P21(9)) was found. The material witnesses testified that the accused standing outside shop No. 90 was shooting in the direction of shop 92 and in the direction of the large flower pot. In either case, the accused was shooting away from shop number 90 and the 2 slugs recovered from shop No. 92 could not possibly be from the accused's firearm. Where the 2 bullet slugs were found was therefore seriously in doubt. The third bullet slug was found near the large flower pot where SP12 had taken his position. However, in the absence of any evidence that the vicinity was guarded after the shootout, and the diffident manner in which SP18 had rendered his evidence, little reliance could be placed on SP18's evidence, save that 3 slugs but not from the constables' firearms were found in the vicinity of the robbery in question.

There was however no reliance on the evidence of the identification parade as its probative weight was deprecated by the following.

The material witnesses at the scene of the alleged offence (SP1, the complainant, SP9 and SP12) were confined to the same room before they were individually called upon to identify the robber. While nothing could prevent SP1 and SP15 from exchanging mutual notes and recollection of the person who robbed their shop, and in the case of the police constables likewise of the person who shot at them, yet to have assembled all witnesses in the same room just as they were required to identify the robber, was less than desirable, as it gave the witnesses (at the parade) an opportunity, if need be, to fortify, and even correct their recollection of the robber, and that possibility was not excluded by the prosecution.

More prominently, the identification parade was conducted in a manner that was less than fair - the accused and 11 others were paraded behind a one-way mirror - as the accused was not given an opportunity of seeing the actual identification process and his accusers.

There are no statutory provisions governing the conduct of an identification parade. The police have only the guidelines in the Inspector-General's standing orders. Still needless to say, an identification parade must not only be conducted fairly but also seen to be conducted in as fair as manner as possible, but not be so if the goings-on at the actual identification

process were screened from a suspect. Bearing in mind the purpose and function of an identification parade is to have confirmed an arrested person as the wrongdoer, and for all practical purposes, the other participants in a parade are merely making up the numbers, plucked off the streets (usually the case), the actual identification process must be transparent to the real suspect. In the instant case, the 4 witnesses who testified to their identification of the accused by way of a one-way mirror, admitted they could not be seen by the accused; the evidence that the accused was identified during the parade was therefore the prosecution's and the only version before the Court. The accused, barred from witnessing the identification process, was denied an opportunity to give his version of the events at the parade. Of course, an accused despite witnessing the entire identification process is yet not precluded from alleging an unfair identification parade. Then it is an issue from the Court to settle, after it had taken into account the credibility and demeanour of witnesses and relating their testimony to the undeniable evidence available. However, in the instant case there was a total denial to the accused of all that were going on behind the one-way mirror, and where entitled to know and to witness the accused was made dependent on others, none of who were on his side.

In *Ong Lai Kim v. PP* [1991] 3 MLJ 111 - an appeal against a conviction for rape and robbery - the appellants' objection at the trial Court to their identification at the parade with the victim standing behind a one-way mirror was advanced as the main ground in the appeal. Dismissing the appeal, Justice Zakaria Yatim J (as he then was) noted the absence of any express provision in the Criminal Procedure Code (FMS Cap 6) or in the Evidence Act 1950 on the procedure for identification parades, and held that by virtue of s. 5 of the CPC the English procedure on identification parades was applicable. The learned Judge cited a passage from *Archbold's Criminal Pleading and Practice* (43rd Edn.,) p. 1148, reproduced below *in extenso*:

> A parade may take place either in a normal room or in one equipped with a screen permitting witnesses to see members of the parade without being seen ... The procedures for the composition and conduct of the parade are the same in both cases, subject to para. 7 below (except that a parade involving a screen may take place only when the suspect's solicitor, friend or appropriate adult is present or the parade is recorded on video) ... Once the parade had been formed, everything afterwards in respect of it shall take place in the presence and hearing of the suspect and of any interpreter, solicitor, friend or appropriate adult who is present (unless the parade involves a screen, in which case everything said to or by any witness at the place where the parade is held must be said in the hearing and presence of the suspect's solicitor, friend or appropriate adult or be recorded on video).

and furthermore held that the police was justified in adopting the one-way mirror procedure, as (i) the appellants had not retained Counsel when the parade was conducted, (ii) there was no evidence to show the police had denied the appellants to have their friends or solicitors present, (iii) the victim was not willing to attend an identification parade, being too scared to face her assailants once more and (iv) the identification parade must be conducted to complete the police investigation.

Where there is sufficient cause, it is certainly not improper to conduct an identification parade using a one-way mirror. Yet with the justification, a one-way mirror is only in use in England with the safeguards enumerated in Archbold. In the instant case, the officer in charge of the parade testified that he asked the accused whether he requires the presence of his solicitor, to which the accused promptly declined. However that invitation satisfied none but one aspect of the safeguards, and conducted in the manner said, it could not be said that the parade was conducted fairly.

Thus, at the close of the prosecution case there was no doubt whatsoever of the robbery at 90 Leboh Pitt, Georgetown, of the discharge of a firearm, and the robber was undoubtedly the accused.

Section 3 of the Firearms (Increased Penalties) Act 1971 (the Act) read as follows:

> Any person who at the time of his committing or attempting to commit or abetting the commission of a scheduled offence discharges a firearm with intent to cause death or hurt to anyone shall notwithstanding that no hurt is caused thereby, by punished with death.

and robbery, within the definition of the Penal Code, was listed in the 1st Schedule of the Act as a schedule offence.

The ingredients to be proved for a s. 3 offence was therefore (i) a robbery committed by the accused and (ii) the accused "at the time of his committing (the) robbery" discharged a firearm with intent to cause death or hurt to anyone. That no hurt was caused by the discharge of the firearm was however of no consequence to the offence.

The predicate to the discharge of a firearm in s. 3 was "who at the time of his committing". Such precedents there were on s. 3 offences (see *PP v. Hussain bin Sudin* [1991] 3 CLJ 2568; *PP v. Chiong Cheng Wah* [1988] 3 MLJ 56; *PP v. Yap Thiang Wah* [1992] 1 MLJ 206; *Krishnan & Anor v. PP* [1981] 2 MLJ 121) did not elaborate on the words in question. There was no such need as the facts in each of those cases disclosed the firearm concerned was clearly discharged before the completion of the scheduled offence, and the question, whether the accused concerned had discharged a firearm "at the time of his committing the schedule offence", never arose for judicial consideration.

The evidence in the instant case however offered no such luxury. The accused had walked out of the shop he robbed. His victims, though in state of shock and fear, were not physically harmed nor threatened by a discharge of a firearm. The accused was outside the shop, and was making his getaway when he discharged his firearm, not at his victims, but at the constables lurking nearby. Could it therefore be said that the accused had discharged his firearm "at the time he was committing" the scheduled offence?

Some understanding of the word "at" was deduced from the following:

In *Doe d. Ellis v. Owens* [1842] 12 LJ Ex 53, the word "at " was judicially enunciated to read as **before** and not **after**, and the Court further pronounced that the words "at the commencement" have reference to time, and can only mean before or at the time of commencing the suit.

Black's Law Dictionary (6th Edn.) defines "at" as a term of considerable elasticity of meaning, and used *inter alia* to fix a time, though not necessarily *eo instante* or the identical time named, or even a fixed definite moment. The word "at" having an elastic meaning was also recognised by the Malaysian Courts in *Sp Suppiah Chettiar v. KS Navaradnam* [1972] 2 MLJ 60.

Section 3(3)(a) of the English Road Safety Act 1967 (substituted by s. 25 of the Road Transport Act 1981) provided that a person who failed to provide a specimen for a laboratory test should be guilty of an offence, if it was shown that "at the relevant time" he was driving or attempting to drive a motor vehicle on a road or other public place. In *Sakhuja v. Allen*

[1972] 2 AER 311, the House of Lords per Viscount Dilhorne said, "to give s. 3 a reasonable interpretation in its context, the words 'at the time' must be given a broad interpretation as signifying the occasion rather than the moment of time when the request was made".

That s. 3 is a penal provision is beyond any argument, and its meaning, giving it a strict interpretation, as is the rule, to penal provisions, must therefore be narrowly construed. The natural meaning of the words "at the time of his committing the offence" emphasize the time of the commission of the offence and specifies the discharge of a firearm before the completion of a schedule offence. The choice in the language - the present participle - was deliberate and reflected the legislature's intention to have severely punished the commission of a scheduled offence, but only if a firearm was discharged during but not after the offence. In the instant case the accused discharged his firearm not at his victims, and it was not proved that the accused discharged a firearm "at the time of his committing the robbery".

Yet having subjected the prosecution evidence to a maximum evaluation on the guidelines enunciated in *Khoo Hi Chiang v. PP* [1994] 1 MLJ 265, the Court was more than satisfied that the accused exhibited a firearm "at the time he was committing a robbery" at 90 Pitt Street, an offence punishable under s. 4 of the same said Act. He discharged his firearm not "at the time he was committing the robbery" but after he had robbed the goldsmith. The charge to wit that he discharged the firearm at the constables "at the time of his committing" the schedule offence was therefore not made out; in fact, the constables were two doors away. The accused only exhibited a firearm "at the time of his committing a schedule offence" and the schedule offence, within the context of the Act, was completed when the accused was outside the complainant's shop.

The discharge of the firearm was therefore an act separate and distinct from the robbery. But having said that, the discharge of a firearm at the constables must surely be a punishable offence; the provisions in the Act were considered but having taken into account the prosecution's *prima facie* case under s. 4, no trifling matter, it was the finding of the Court that a charge under s. 308 of the Penal Code was the appropriate charge to be added for rebuttal by the accused.

Section 308 of the Penal Code read as follows:

> Anyone does an act with intention or knowledge and under such circumstances that if he by that act caused death he would be guilty of culpable homicide not amounting to murder, shall be punished with imprisonment for a term which may extend to three years, or with fine, or with both; and if hurt is caused to any person by such act, shall be punished with imprisonment for a term which may extend to seven years, or with fine, or with both.

A necessary ingredient of a s. 308 offence was intention or knowledge. That intention was inferred from the accused's conduct, as he surely must have known, and it was so imputed, that his shots at the constables, even intended to hold the constables at bay, could cause such grievous bodily harm as likely to cause death.

For the reasons set out in this judgment, the Court amended the original charge under s. 3 to s. 4 of the Act and added a charge under s. 308 of the Penal Code, and called upon the accused to enter his defence on the following charges:

> (1) Bahawa kamu pada 18 Ogos 1992 jam lebih kurang 3.30 petang, di Kedai Tai Loong Diamond & Jewellery di No. 90 Lebuh Pitt, di dalam Daerah Timur Laut, di dalam Negeri Pulau Pinang, telah melakukan rompakan dan semasa melakukan rompakan itu, telah mempamirkan senjatapi dalam keadaan yang mana ia menyebabkan Liew Kim Wah

dan Leow Yeow Wah ketakutan yang boleh menyebabkan kematian atau kecederaan, dengan demikian kamu telah melakukan kesalahan di bawah seksyen 4, Akta Senjatapi (Penalti Lebih Berat) Tahun 1971 (Akta 37) yang boleh dihukum di bawah seksyen yang sama Akta tersebut.

(2) Bahawa kamu pada 18 Ogos 1992 jam lebih kurang 3.30 petang, di luar Kedai Tai Loong Diamond & Jewellery di No. 90, Lebuh Pitt, di dalam Daerah Timur Laut, di dalam Negeri Pulau Pinang, telah melepaskan tembakan senjatapi ke arah Konstabel 89541 Mohd. Tahir bin Mohd. Shan dan Konstable 109196 Mohd. Yusof bin Ismail dengan niat hendak menyebabkan kematian atau hendak menyebabkan sesuatu bencana tubuh yang mungkin menyebabkan kematian dan dengan demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah s. 308 Kanun Keseksaan.

The accused elected to give his evidence on oath.

The accused was the only defence witness, and raised just one issue in his defence. He virtually confirmed what was said by SP1 and SP15 about the robbery. He said he entered the shop and pulled out an imitation gun. He declared he was staging a hold-up, and demanded the gold ornaments in the display counter. He placed a plastic bag on the display counter, and SP1 handed to him 2 trays containing gold ornaments. He emptied the gold ornaments from the trays into a plastic bag and proceeded to walk out of the shop. The door was however locked. He then pointed his imitation gun at SP1 and demanded that the door be opened for him.

Up to that point all that was said by SP1 and SP15 was not disputed by the accused, and the Court had the accused's judicial admission that he staged the robbery and had the complainant's gold ornaments with him when he walked out of the shop.

The accused however disputed the prosecution's version of the events after he was outside the shop. He said he was fired upon by the constables the moment he stepped out of the shop. He sheltered behind one of the shop pillars, but each time he protruded his head he was fired upon. Thinking only of escape, he dashed to his motorcycle and took off in the direction of Chulia Street, towards Odean Cinema. As he was getting away he felt he was hit. He maintained he was not in possession and had not discharged a firearm; his was an imitation firearm.

Before considering the defence, the Court duly reminded itself that an accused is not at all obliged to prove his innocence. An accused person has no legal burden of proof, and even called upon to enter his defence, and that after the prosecution had made up a *prima facie* case unless rebutted would warrant his conviction, he has only to create a doubt to the prosecution case that he is guilty as charged. An accused is entitled to benefit from any defect or infirmity in the prosecution case, or from any doubt in the prosecution case. Whether the doubt in the prosecution case arose in the prosecution case itself or during the defence stage is however quite immaterial. In the instant case, there were no legal presumptions that required a rebuttal on the balance of probabilities, and a reasonable doubt was sufficient to earn the accused an acquittal.

The accused said his was an imitation gun; whether the accused had an imitation gun was exposed by one penetrating question from the learned DPP, who asked:

> if yours was an imitation gun why did you not throw it away? If you had thrown it away, would the police constables not stopped their shooting?

Sensing he had the accused cornered, the learned DPP pursued with the following question:

> if you had thrown away the bag of gold would not the constables also stopped their shooting?

The question not asked by the learned DPP was of course, "Where is the imitation gun?"

The imitation gun issue was however raised only in the defence, as throughout the prosecution case the defence did not impart a suggestion or hint of a such possible defence. In *Lin Lian Chen v. PP* [1992] 4 CLJ 2086, the Supreme Court per Justice Edgar Joseph Jr. SCJ at p. 2092 said:

> Indeed, it behoves the defence to do so (to put its case at the earliest possible stage) for we need hardly say that if a defence is sprung in Court for the first time when the accused makes his defence from the witness box or the dock, so that the prosecution is taken by surprise, the accused runs the risk of being criticised for keeping his defence 'up his sleeve' so to speak, and it branded as a recent invention.

In the instant case, that statement by the Supreme Court was certainly fortuitous. Even so, was the evidence against the possibility of an imitation gun? At the close of the prosecution case, it was the finding of the Court that there was indeed a robbery. Giving his defence, the accused accepted SP1 and SP15's version of the robbery although he disputed the discharge of a firearm. In the event, the prosecution's version of the robbery (in the shop) was entirely conceded by the accused, and SP1 and SP15's credibility were completely intact - therefore was there reason to doubt SP1 and SP15's evidence that the accused discharged a firearm the moment he walked out of the shop? Both said they heard several rounds of gunfire and one of them even he saw "api" from the barrel of the accused's firearm.

The constables who were 2 doors away saw the accused behind the front glass door with a gun in his hand, evidence that was confirmed by the accused. The prosecution's version of all events up to that point was therefore agreed. Where the accused differed was to the events outside the goldsmith shop.

According to the constables the accused fired at them the moment he walked out of the shop. SP12 said he was covered by SP9 as he ran to a big flower pot in front of the shop. SP9 and S12 were therefore positioning themselves to better vantage points - putting the accused in their cross-fire - and diverting the accused's gun-fire. If the accused had an imitation gun, and shots were not fired at the constables, why should the constables position and deploy themselves in a manner that was consistent with them being fired upon? If indeed the accused was not discharging a firearm, where was a need for the constables, to cover each other, despite the considerable risks to themselves, and fire from the relative safety of shop pillars and large flower pot for about 2 - 3 minutes? Why should the constables be shooting at the accused fleeing from the scene if they were not shot at firstly?

The accused said he had not thrown out the imitation gun because he was frightened and was thinking merely of flight; but his admitted robbery of a goldsmith located in one of the busiest streets in Georgetown, even armed with an imitation gun, was a brazen and audacious act of extreme boldness and daring, requiring composure, resolve and nerve. That being so, it would indeed be out of character if the accused was far too frightened to have thought about throwing the imitation gun away. The branding of the imitation gun as a recent invention therefore had basis.

The robbery was not disputed. Having duly considered the defence of an imitation gun, but disbelieved for the reasons given in this grounds, the Court found, at the end of the defence, no doubt whatsoever was cast (i) on the prosecution case of an exchange of gun-fire outside the complainant's shop, an exchange not possible if the accused had not discharged a firearm within the meaning of s. 2 of the Act, and (ii) the firearm discharged by the accused was the firearm exhibited during the robbery. Yes, there were some discrepancies in the prosecution witnesses' evidence, but they were entirely minor and did not affect the *prima facie* case. Otherwise, the prosecution case was clear cut, straight forward and absolute, and there was no doubt what had actually happened. The 3 non-government issue bullet slugs found at the scene, although the actual location where it was found was in doubt, was the independent and corroborative evidence of a gun battle between the constables and the accused.

No doubt whatsoever having been cast by the accused to either of the amended charges he was called to rebut, the accused was accordingly convicted and sentenced by the provisions of s. 4 of the Act and s. 308 of the Penal Code.